

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

**May 19, 2022**

SEAN F. McAVOY, CLERK

**UNITED STATES DISTRICT COURT**  
**EASTERN DISTRICT OF WASHINGTON**

JENNIFER W.,<sup>1</sup>

Plaintiff,

vs.

KILOLO KIJAKAZI, ACTING  
COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

No. 4:20-cv-05234-MKD

ORDER DENYING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT AND GRANTING  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT

ECF Nos. 16, 17

Before the Court are the parties' cross-motions for summary judgment. ECF Nos. 16, 17. The Court, having reviewed the administrative record and the parties' briefing, is fully informed. For the reasons discussed below, the Court denies Plaintiff's motion, ECF No. 16, and grants Defendant's motion, ECF No. 17.

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<sup>1</sup> To protect the privacy of plaintiffs in social security cases, the undersigned identifies them by only their first names and the initial of their last names. *See* LCivR 5.2(c).

## JURISDICTION

The Court has jurisdiction over this case pursuant to 42 U.S.C. §§ 405(g); 1383(c)(3).

## STANDARD OF REVIEW

A district court's review of a final decision of the Commissioner of Social Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is limited; the Commissioner's decision will be disturbed "only if it is not supported by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.* at 1159 (quotation and citation omitted). Stated differently, substantial evidence equates to "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and citation omitted). In determining whether the standard has been satisfied, a reviewing court must consider the entire record as a whole rather than searching for supporting evidence in isolation. *Id.*

In reviewing a denial of benefits, a district court may not substitute its judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001). If the evidence in the record "is susceptible to more than one rational interpretation, [the court] must uphold the ALJ's findings if they are supported by inferences reasonably drawn from the record." *Molina v. Astrue*, 674

1 F.3d 1104, 1111 (9th Cir. 2012), *superseded on other grounds by* 20 C.F.R. §§  
2 404.1502(a), 416.902(a). Further, a district court “may not reverse an ALJ’s  
3 decision on account of an error that is harmless.” *Id.* An error is harmless “where  
4 it is inconsequential to the [ALJ’s] ultimate nondisability determination.” *Id.* at  
5 1115 (quotation and citation omitted). The party appealing the ALJ’s decision  
6 generally bears the burden of establishing that it was harmed. *Shinseki v. Sanders*,  
7 556 U.S. 396, 409-10 (2009).

#### 8 **FIVE-STEP EVALUATION PROCESS**

9 A claimant must satisfy two conditions to be considered “disabled” within  
10 the meaning of the Social Security Act. First, the claimant must be “unable to  
11 engage in any substantial gainful activity by reason of any medically determinable  
12 physical or mental impairment which can be expected to result in death or which  
13 has lasted or can be expected to last for a continuous period of not less than twelve  
14 months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). Second, the claimant’s  
15 impairment must be “of such severity that he is not only unable to do his previous  
16 work[,] but cannot, considering his age, education, and work experience, engage in  
17 any other kind of substantial gainful work which exists in the national economy.”  
18 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

19 The Commissioner has established a five-step sequential analysis to  
20 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§

1 404.1520(a)(4)(i)-(v), 416.920(a)(4)(i)-(v). At step one, the Commissioner  
2 considers the claimant's work activity. 20 C.F.R. §§ 404.1520(a)(4)(i),  
3 416.920(a)(4)(i). If the claimant is engaged in "substantial gainful activity," the  
4 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§  
5 404.1520(b), 416.920(b).

6 If the claimant is not engaged in substantial gainful activity, the analysis  
7 proceeds to step two. At this step, the Commissioner considers the severity of the  
8 claimant's impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the  
9 claimant suffers from "any impairment or combination of impairments which  
10 significantly limits [his or her] physical or mental ability to do basic work  
11 activities," the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c),  
12 416.920(c). If the claimant's impairment does not satisfy this severity threshold,  
13 however, the Commissioner must find that the claimant is not disabled. *Id.*

14 At step three, the Commissioner compares the claimant's impairment to  
15 severe impairments recognized by the Commissioner to be so severe as to preclude  
16 a person from engaging in substantial gainful activity. 20 C.F.R. §§  
17 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the impairment is as severe or more  
18 severe than one of the enumerated impairments, the Commissioner must find the  
19 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d), 416.920(d).

1 If the severity of the claimant's impairment does not meet or exceed the  
2 severity of the enumerated impairments, the Commissioner must pause to assess  
3 the claimant's "residual functional capacity." Residual functional capacity (RFC),  
4 defined generally as the claimant's ability to perform physical and mental work  
5 activities on a sustained basis despite his or her limitations, 20 C.F.R. §§  
6 404.1545(a)(1), 416.945(a)(1), is relevant to both the fourth and fifth steps of the  
7 analysis.

8 At step four, the Commissioner considers whether, in view of the claimant's  
9 RFC, the claimant is capable of performing work that he or she has performed in  
10 the past (past relevant work). 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).  
11 If the claimant is capable of performing past relevant work, the Commissioner  
12 must find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(f), 416.920(f).  
13 If the claimant is incapable of performing such work, the analysis proceeds to step  
14 five.

15 At step five, the Commissioner considers whether, in view of the claimant's  
16 RFC, the claimant is capable of performing other work in the national economy.  
17 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). In making this determination,  
18 the Commissioner must also consider vocational factors such as the claimant's age,  
19 education, and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),  
20 416.920(a)(4)(v). If the claimant is capable of adjusting to other work, the

1 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§  
2 404.1520(g)(1), 416.920(g)(1). If the claimant is not capable of adjusting to other  
3 work, the analysis concludes with a finding that the claimant is disabled and is  
4 therefore entitled to benefits. *Id.*

5 The claimant bears the burden of proof at steps one through four above.  
6 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to  
7 step five, the burden shifts to the Commissioner to establish that 1) the claimant is  
8 capable of performing other work; and 2) such work “exists in significant numbers  
9 in the national economy.” 20 C.F.R. §§ 404.1560(c)(2), 416.960(c)(2); *Beltran v.*  
10 *Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

### 11 **ALJ’S FINDINGS**

12 On March 20, 2018, Plaintiff applied both for Title II disability insurance  
13 benefits and Title XVI supplemental security income benefits alleging a disability  
14 onset date of July 24, 2017.<sup>2</sup> Tr. 15, 166-67, 294-306. The applications were  
15 denied initially and on reconsideration. Tr. 206-12, 215-20. Plaintiff appeared  
16 before an administrative law judge (ALJ) on April 30, 2020, and a supplemental

17 \_\_\_\_\_  
18 <sup>2</sup> Plaintiff previously applied for disability benefits on January 15, 2014, which  
19 resulted in an unfavorable ALJ decision on May 25, 2017. Tr. 15, 114-32. The  
20 Appeals Council declined to review the decision. Tr. 15, 133-39.

1 hearing was held on June 9, 2020. Tr. 70-113. On June 29, 2020, the ALJ denied  
2 Plaintiff's claim. Tr. 12-34.

3 At step one of the sequential evaluation process, the ALJ found Plaintiff,  
4 who met the insured status requirements through September 30, 2017, has not  
5 engaged in substantial gainful activity since July 24, 2017. Tr. 18. At step two,  
6 the ALJ found that Plaintiff has the following severe impairments: mood disorder,  
7 anxiety disorder, borderline personality disorder, and PTSD. Tr. 19.

8 At step three, the ALJ found Plaintiff does not have an impairment or  
9 combination of impairments that meets or medically equals the severity of a listed  
10 impairment. Tr. 22. The ALJ then concluded that Plaintiff has the RFC to perform  
11 work at all exertional levels with the following nonexertional limitations:

12 [Plaintiff] is limited to simple, routine, repetitive tasks; she is  
13 precluded from contact with the public; she can have occasional,  
14 superficial contact with supervisors and coworkers, with no  
15 collaborative tasks; and she requires a routine, predictable work  
16 environment with no more than occasional changes, simple  
17 decision[-]making, and no multi-tasking, assembly line pace, or other  
18 fast-paced work.

19 Tr. 23.

20 At step four, the ALJ found Plaintiff is unable to perform any of her past  
relevant work. Tr. 26. At step five, the ALJ found that, considering Plaintiff's  
age, education, work experience, RFC, and testimony from the vocational expert,  
there were jobs that existed in significant numbers in the national economy that

1 Plaintiff could perform, such as cleaner II, industrial cleaner, and landscape  
2 specialist. Tr. 27. Therefore, the ALJ concluded Plaintiff was not under a  
3 disability, as defined in the Social Security Act, from the alleged onset date of July  
4 24, 2017 through the date of the decision. Tr. 28.

5 On September 23, 2020, the Appeals Council denied review of the ALJ's  
6 decision, Tr. 1-6, making the ALJ's decision the Commissioner's final decision for  
7 purposes of judicial review. *See* 42 U.S.C. § 1383(c)(3).

### 8 ISSUES

9 Plaintiff seeks judicial review of the Commissioner's final decision denying  
10 her disability insurance benefits under Title II and supplemental security income  
11 benefits under Title XVI of the Social Security Act. Plaintiff raises the following  
12 issues for review:

- 13 1. Whether the ALJ properly considered *Chavez*;
- 14 2. Whether the ALJ properly evaluated the medical opinion evidence;
- 15 3. Whether the ALJ conducted a proper step-two analysis;
- 16 4. Whether the ALJ conducted a proper step-three analysis;
- 17 5. Whether the ALJ properly evaluated Plaintiff's symptom claims; and
- 18 6. Whether the ALJ conducted a proper step-five analysis.

19 ECF No. 16 at 4-5.

## DISCUSSION

### A. *Chavez*

Plaintiff contends the ALJ erred in adopting the prior ALJ's findings regarding Plaintiff's physical impairments. ECF No. 16 at 7-9.

"The principles of res judicata apply to administrative decisions, although the doctrine is applied less rigidly to administrative proceedings than to judicial proceedings." *Chavez v. Bowen*, 844 F.2d 691, 693 (9th Cir. 1998) (citing *Lyle v. Sec'y of Health and Human Servs.*, 700 F.2d 566, 568 n.2 (9th Cir. 1983)). Under the doctrine of res judicata, a prior, final determination of nondisability bars relitigation of that claim through the date of the prior decision. *Lester v. Chater*, 81 F.3d 821, 827 (9th Cir. 1995). In the Ninth Circuit, a prior final determination of nondisability "create[s] a presumption that [the claimant] continued to be able to work after that date." *Id.* (citation and internal quotation marks omitted).<sup>3</sup>

However, the "authority to apply res judicata to the period *subsequent* to a prior

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<sup>3</sup> Acquiescence Ruling (AR) 97-4(9) explains how *Chavez* differs from the Social Security Administration's (SSA) interpretation of Social Security policy requiring de novo review of claims for unadjudicated periods. The SSA applies the *Chavez* presumption only as to claimants residing in the Ninth Circuit. AR 97-4(9), available at 1997 WL 742758 at \*3.

determination is much more limited.” *Lester*, 81 F.3d at 827 (emphasis in original). “The claimant, in order to overcome the presumption of continuing nondisability arising from the first administrative law judge’s findings of nondisability, must prove ‘changed circumstances’ indicating a greater disability.” *Chavez*, 844 F.2d at 693 (citation omitted). Examples of changed circumstances include “[a]n increase in the severity of the claimant’s impairment,” “a change in the claimant’s age category,” and a new issue raised by the claimant, “such as the existence of an impairment not considered in the previous application.” *Lester*, 81 F.3d at 827-28 (citations omitted); *see also* AR 97-4(9), available at 1997 WL 742758 at \*3.

Here, the ALJ adopted the prior ALJ’s finding that Plaintiff does not have a severe physical impairment. Tr. 16. The ALJ found there was no new and material evidence concerning Plaintiff’s physical impairments. Tr. 19. Plaintiff argues she has a new diagnosis of fibromyalgia, ECF No. 16 at 8, however, as discussed further *infra*, the ALJ reasonably found fibromyalgia is not a medically determinable impairment. Plaintiff cites to evidence of other physical symptoms but does not demonstrate the evidence is material. *Id.* at 8-9. The ALJ did not err in adopting the prior ALJ’s findings regarding Plaintiff’s physical impairments. Plaintiff is not entitled to remand on these grounds.

## **B. Medical Opinion Evidence**

1 Plaintiff contends the ALJ erred in his consideration of the opinions of Mary  
2 Beth Swihart, ARNP; Farrukh Hashmi, M.D.; Kishore Varada, PA-C; Jamie  
3 Graham, MSW, MHP; Nancy Hillmer, ARNP; and Donna Veraldi, Ph.D. ECF No.  
4 16 at 9-15.

5 As an initial matter, for claims filed on or after March 27, 2017, new  
6 regulations apply that change the framework for how an ALJ must evaluate  
7 medical opinion evidence. *Revisions to Rules Regarding the Evaluation of*  
8 *Medical Evidence*, 2017 WL 168819, 82 Fed. Reg. 5844-01 (Jan. 18, 2017); 20  
9 C.F.R. §§ 404.1520c, 416.920c. The new regulations provide that the ALJ will no  
10 longer “give any specific evidentiary weight . . . to any medical  
11 opinion(s) . . .” *Revisions to Rules*, 2017 WL 168819, 82 Fed. Reg. 5844, at 5867-  
12 68; *see* 20 C.F.R. §§ 404.1520c(a), 416.920c(a). Instead, an ALJ must consider  
13 and evaluate the persuasiveness of all medical opinions or prior administrative  
14 medical findings from medical sources. 20 C.F.R. §§ 404.1520c(a) and (b),  
15 416.920c(a) and (b). The factors for evaluating the persuasiveness of medical  
16 opinions and prior administrative medical findings include supportability,  
17 consistency, relationship with the claimant (including length of the treatment,  
18 frequency of examinations, purpose of the treatment, extent of the treatment, and  
19 the existence of an examination), specialization, and “other factors that tend to  
20 support or contradict a medical opinion or prior administrative medical finding”

(including, but not limited to, “evidence showing a medical source has familiarity with the other evidence in the claim or an understanding of our disability program’s policies and evidentiary requirements”). 20 C.F.R. §§ 404.1520c(c)(1)-(5), 416.920c(c)(1)-(5).

Supportability and consistency are the most important factors, and therefore the ALJ is required to explain how both factors were considered. 20 C.F.R. §§ 404.1520c(b)(2), 416.920c(b)(2). Supportability and consistency are explained in the regulations:

(1) *Supportability*. The more relevant the objective medical evidence and supporting explanations presented by a medical source are to support his or her medical opinion(s) or prior administrative medical finding(s), the more persuasive the medical opinions or prior administrative medical finding(s) will be.

(2) *Consistency*. The more consistent a medical opinion(s) or prior administrative medical finding(s) is with the evidence from other medical sources and nonmedical sources in the claim, the more persuasive the medical opinion(s) or prior administrative medical finding(s) will be.

20 C.F.R. §§ 404.1520c(c)(1)-(2), 416.920c(c)(1)-(2). The ALJ may, but is not required to, explain how the other factors were considered. 20 C.F.R. §§ 404.1520c(b)(2), 416.920c(b)(2). However, when two or more medical opinions or prior administrative findings “about the same issue are both equally well-supported . . . and consistent with the record . . . but are not exactly the same,” the ALJ is required to explain how “the other most persuasive factors in paragraphs

(c)(3) through (c)(5)” were considered. 20 C.F.R. §§ 404.1520c(b)(3), 416.920c(b)(3).

Defendant argues Ninth Circuit case law is no longer controlling in light of the amended regulations, specifically whether the “clear and convincing” and “specific and legitimate” standards still apply. ECF No. 17 at 11-13. The Ninth Circuit recently addressed the issue of whether the changes to the regulations displace the longstanding case law requiring an ALJ to provide specific and legitimate reasons to reject an examining provider’s opinion. *Woods v. Kijakazi*, No. 21-35458, 2022 WL 1195334, at \*3 (9th Cir. Apr. 22, 2022). The Court held that the new regulations eliminate any hierarchy of medical opinions, and the specific and legitimate standard no longer applies. *Id.* at \*3-4. The Court reasoned the “relationship factors” remain relevant under the new regulations, and thus the ALJ can still consider the length and purpose of the treatment relationship, the frequency of examinations, the kinds and extent of examinations that the medical source has performed or ordered from specialists, and whether the medical source has examined the claimant or merely reviewed the claimant’s records. *Id.* at 6. However, the ALJ is not required to make specific findings regarding the relationship factors. *Id.* Even under the new regulations, an ALJ must provide an explanation supported by substantial evidence when rejecting an examining or treating doctor’s opinion as unsupported or inconsistent. *Id.*

1           *1. Ms. Swihart*

2           Ms. Swihart, a treating nurse practitioner, rendered opinions on Plaintiff's  
3 functioning in February and March 2020. Tr. 1486-91. The ALJ addressed both  
4 opinions and gave multiple reasons to find the opinions were not persuasive. Tr.  
5 21. Plaintiff argues the ALJ erred by failing to address either of Ms. Swihart's  
6 opinions. ECF No. 16 at 14-15 (citing to Tr. 25-26). Defendant's responsive brief  
7 cites to the ALJ's analysis of Ms. Swihart's opinion. ECF No. 17 at 18-19.  
8 However, Plaintiff's reply brief states that while Defendant asserts the ALJ offered  
9 valid reasons to find Ms. Swihart's opinions unpersuasive, "Defendant is unable to  
10 provide any reasoning or point to where it is contained in the decision." ECF No.  
11 18 at 8. Plaintiff's assertion is a misrepresentation of the record and Defendant's  
12 brief. Plaintiff has failed to challenge any of the reasons the ALJ set forth in  
13 finding Ms. Swihart's opinion unpersuasive. Thus, any challenge to those findings  
14 is waived. *See Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2  
15 (9th Cir. 2008) (determining Court may decline to address on the merits issues not  
16 argued with specificity); *Kim v. Kang*, 154 F.3d 996, 1000 (9th Cir. 1998) (the  
17 Court may not consider on appeal issues not "specifically and distinctly argued" in  
18 the party's opening brief). The Court declines to address this issue.

19           *2. Dr. Hashmi and Mr. Varada*  
20

1 On August 7, 2017, Dr. Hashmi and Mr. Varada, both of whom are treating  
2 providers, co-signed an opinion regarding Plaintiff's functioning. Tr. 553-56.  
3 They opined Plaintiff has moderate limitations in her ability to ask simple  
4 questions or request assistance, and be aware of normal hazards and take  
5 appropriate precautions; severe limitations in her ability to maintain attention and  
6 concentration for extended periods, perform activities within a schedule, maintain  
7 regular attendance and be punctual within customary tolerances, work in  
8 coordination with or proximity to others without being distracted by them, make  
9 simple work-related decisions, complete a normal workday/workweek without  
10 interruptions from psychologically-based symptoms and perform at a consistent  
11 pace without an unreasonable number and length of rest periods, interact  
12 appropriately with the general public, accept instructions and respond  
13 appropriately to criticism from supervisors, get along with coworkers/peers  
14 without distracting them or exhibiting behavioral extremes, respond appropriately  
15 to changes in the work setting, and travel to unfamiliar places or use public  
16 transportation; and Plaintiff has marked limitations in the remaining areas of  
17 functioning. Tr. 553-54. Regarding the "B" Criteria, they opined Plaintiff has  
18 marked limitations in her ability to understand, remember or apply information and  
19 adapt or manage oneself, and extreme limitations in her ability to interact with  
20 others, and concentrate, persist or maintain pace. Tr. 555. They further opined

1 Plaintiff meets the “C” Criteria of mental listings, and she would be off task more  
2 than 30 percent of the time, but she would miss no work. Tr. 555-56. The ALJ  
3 found Dr. Hashmi and Mr. Varada’s opinion was not persuasive. Tr. 25.

4 First, the ALJ found the opinion was in a check-box form and lacked a  
5 supporting narrative or explanation. *Id.* Supportability is one of the most  
6 important factors an ALJ must consider when determining how persuasive a  
7 medical opinion is. 20 C.F.R. §§ 404.1520c(b)(2), 416.920c(b)(2). The more  
8 relevant objective evidence and supporting explanations that support a medical  
9 opinion, the more persuasive the medical opinion is. 20 C.F.R. §§  
10 404.1520c(c)(1), 416.920c(c)(1). The opinion consists only of check boxes and  
11 does not contain any explanation or citations to supporting evidence. Tr. 553-56.  
12 Plaintiff argues the opinion is supported by the treatment notes, however the ALJ  
13 reasonably found the opinion is also not supported by the treatment records, as  
14 discussed *infra*.

15 Second, the ALJ found the opinion was inconsistent with Plaintiff’s  
16 activities of daily living. Tr. 25. Consistency with the other evidence is one of the  
17 most important factors in determining the persuasiveness of an opinion. 20 C.F.R.  
18 §§ 404.1520c(b)(2), 416.920c(b)(2). While the opinion indicates Plaintiff has  
19 marked to severe limitations in almost every area of functioning, Tr. 553-56,  
20 Plaintiff has reported caring for her children without support, completing

1 household tasks, handling her finances without issue, and attending college  
2 courses, Tr. 24. Although Plaintiff argues she did not complete the GED course,  
3 and she received support from her parents in caring for her children, there are  
4 contradictory records that document Plaintiff reporting she completed the GED  
5 course, and reports her mother was only in town for a few months, as discussed  
6 further *infra*. The ALJ reasonably found Plaintiff's activities of daily living were  
7 inconsistent with marked to severe limitations.

8 Third, the ALJ found the opinion was not supported by the treatment  
9 records. Tr. 25. Supportability is one of the most important factors an ALJ must  
10 consider when determining how persuasive a medical opinion is. 20 C.F.R. §§  
11 404.1520c(b)(2), 416.920c(b)(2). The more relevant objective evidence and  
12 supporting explanations that support a medical opinion, the more persuasive the  
13 medical opinion is. 20 C.F.R. §§ 404.1520c(c)(1), 416.920c(c)(1). While  
14 treatment records document some abnormalities, the ALJ noted Plaintiff often had  
15 many normal findings on mental status examination, and the level of abnormalities  
16 was not consistent with disabling mental health limitations. Tr. 22-24. The ALJ  
17 found the opinion was also not consistent with Mr. Varada's own treatment notes.  
18 Tr. 25. Plaintiff argues the ALJ failed to address the providers' notes, ECF No. 16  
19 at 9-10, however the ALJ's decision contains analysis of the providers' treatment  
20 notes in other portions of the decision, Tr. 22-24. As an ALJ's decision should be

1 read as a whole, the Court considers the ALJ's overall analysis of the medical  
2 evidence. *See Jones v. Barnhart*, 364 F.3d 501, 505 (3d Cir. 2004); *Rice v.*  
3 *Barnhart*, 384 F.3d 363, 370 n.5 (7th Cir. 2004).

4 While Mr. Varada opined in August 2017 that Plaintiff has marked to severe  
5 limitations in most areas of functioning, Plaintiff had generally normal findings on  
6 examination on the day Mr. Varada rendered the opinion, as well as at  
7 appointments following and preceding the opinion date. Tr. 587, 590, 593.  
8 Plaintiff was noted as sad/depressed, anxious, and hopeless, with poor  
9 confidence/esteem, but normal appearance, behavior, speech, thought process,  
10 insight/judgment, consciousness, orientation, memory, language, and fund of  
11 knowledge. Tr. 587, 590. Plaintiff argues Mr. Varada's treatment records are  
12 consistent with the opinion, however Plaintiff largely cites to her own self-reported  
13 symptoms such as impaired sleep, fatigue, feelings of having too much  
14 responsibility, while Plaintiff had largely normal mental status examinations  
15 despite her reported symptoms. ECF No. 16 at 11, Tr. 534-35, 1379-80. The ALJ  
16 reasonably found the opinion was inconsistent with the objective medical evidence.

17 *3. Ms. Graham*

18 On March 30, 2018, Ms. Graham, a treating provider, rendered an opinion  
19 on Plaintiff's functioning. Tr. 1367-70. Ms. Graham opined Plaintiff has no  
20 significant limitations in her ability to respond appropriately to changes in the

1 work setting; mild limitations in her ability to remember locations and work-like  
2 procedures, understand/remember very short and simple instructions, carry out  
3 very short simple instructions, make simple work-related decisions, get along with  
4 coworkers or peers without distracting them or exhibiting behavioral extremes,  
5 maintain socially appropriate behavior and adhere to basic standards of  
6 neatness/cleanliness, be aware of normal hazards and take appropriate precautions;  
7 moderate limitations in her ability to understand and remember detailed  
8 instructions, carry out detailed instructions, maintain attention/concentration for  
9 extended periods, sustain an ordinary routine without special supervision, ask  
10 simple questions or request assistance, and accept instructions and respond  
11 appropriately to criticism from supervisors; and marked limitations in her ability to  
12 perform activities within a schedule, maintain regular attendance and be punctual  
13 within customary tolerances, work in coordination with or proximity to others  
14 without being distracted by them, complete a normal workday/workweek without  
15 interruptions from psychologically based symptoms and perform at a consistent  
16 pace without an unreasonable number/length of rest periods, interact appropriately  
17 with the general public, travel to unfamiliar places or use public transportation, and  
18 set realistic goals or make plans independently of others. Tr. 1367-68. She opined  
19 Plaintiff has moderate limitations in her ability to understand, remember, or apply  
20 information and marked limitations in the other three “B” criteria, and Plaintiff

1 meets the “C” criteria of the mental health listings. Tr. 1369. She further opined  
2 Plaintiff would be off task more than 30 percent of the time and would miss four or  
3 more days per month of work. Tr. 1370. The ALJ found Ms. Graham’s opinion  
4 was not persuasive. Tr. 26.

5 First, the ALJ found Ms. Graham’s opinion was in a check-box form and  
6 lacked a supporting narrative or explanation. *Id.* Supportability is one of the most  
7 important factors an ALJ must consider when determining how persuasive a  
8 medical opinion is. 20 C.F.R. §§ 404.1520c(b)(2), 416.920c(b)(2). The more  
9 relevant objective evidence and supporting explanations that support a medical  
10 opinion, the more persuasive the medical opinion is. 20 C.F.R. §§  
11 404.1520c(c)(1), 416.920c(c)(1). Ms. Graham’s opinion consists only of check  
12 boxes and does not contain any explanation or citations to supporting evidence.  
13 Tr. 1367-70. Plaintiff argues the opinion is supported by the treatment notes,  
14 however the ALJ reasonably found the opinion is also not supported by the  
15 treatment records, as discussed *infra*.

16 Second, the ALJ found Ms. Graham’s opinion was inconsistent with  
17 Plaintiff’s activities of daily living. Tr. 25. Consistency with the other evidence is  
18 one of the most important factors in determining the persuasiveness of an opinion.  
19 20 C.F.R. §§ 404.1520c(b)(2), 416.920c(b)(2). As discussed *supra*, the ALJ  
20 reasonably found Plaintiff’s ability to engage in multiple activities, including

1 independently caring for herself, her household, and multiple children and taking  
2 classes through a college, is inconsistent with an opinion that Plaintiff has multiple  
3 marked limitations.

4 Third, the ALJ found Ms. Graham's opinion is not supported by the  
5 treatment records. Tr. 25-26. Supportability is one of the most important factors  
6 an ALJ must consider when determining how persuasive a medical opinion is. 20  
7 C.F.R. §§ 404.1520c(b)(2), 416.920c(b)(2). The more relevant objective evidence  
8 and supporting explanations that support a medical opinion, the more persuasive  
9 the medical opinion is. 20 C.F.R. §§ 404.1520c(c)(1), 416.920c(c)(1). Ms.  
10 Graham's records document Plaintiff's self-reported anxiety and depression  
11 symptoms, suicidal ideation when stressed, and reported limitations. Tr. 561, 567,  
12 569, 573, 575, 1376. The records contain minimal objective evidence; Ms.  
13 Graham noted Plaintiff was tearful at multiple appointments, but noted Plaintiff  
14 was alert and oriented, and did not document any other mental status examination  
15 findings. Tr. 568, 571, 573, 575, 1376. While Plaintiff argues Ms. Graham's  
16 treatment records support her opinion, ECF No. 16 at 12, there is minimal evidence  
17 that supports her opinion. For example, Ms. Graham opined Plaintiff has moderate  
18 limitations in her ability to understand and remember detailed instructions, but her  
19 records do not contain any notes regarding Plaintiff's memory. Tr. 1367. While  
20 she opined Plaintiff has marked limitations in her ability to concentrate, persist, or

1 maintain pace, Tr. 1369, there is little objective evidence of Plaintiff's ability to  
2 concentrate during appointments. The ALJ reasonably found Ms. Graham's  
3 opinion is not supported by the treatment records.

4 *4. Ms. Hillmer*

5 On February 10, 2020, Ms. Hillmer, a treating provider, rendered an opinion  
6 on Plaintiff's functioning. Tr. 1450-53. Ms. Hillmer opined Plaintiff has moderate  
7 limitations in her ability to carry out very short simple instructions, marked  
8 limitations in her ability to remember locations and work-like procedures,  
9 understand/remember very short and simple instructions, make simple work-  
10 related decisions, respond appropriately to changes in the work setting, be aware of  
11 normal hazards and take appropriate precautions, and set realistic goals or make  
12 plans independently of others; and severe limitations in the remaining areas of  
13 functioning. Tr. 1450-51. She further opined Plaintiff has extreme limitations in  
14 all four "B" criteria, meets the "C" criteria for the mental health listings, would be  
15 off task more than 30 percent of the time, and would miss four or more days of  
16 work per month. Tr. 1452-53. The ALJ found Ms. Hillmer's opinion was not  
17 persuasive. Tr. 26.

18 First, the ALJ found Ms. Hillmer's opinion was in a check-box form and  
19 lacked a supporting narrative or explanation. *Id.* Supportability is one of the most  
20 important factors an ALJ must consider when determining how persuasive a

1 medical opinion is. 20 C.F.R. §§ 404.1520c(b)(2), 416.920c(b)(2). The more  
2 relevant objective evidence and supporting explanations that support a medical  
3 opinion, the more persuasive the medical opinion is. 20 C.F.R. §§  
4 404.1520c(c)(1), 416.920c(c)(1). Ms. Hillmer's opinion consists only of check  
5 boxes and does not contain any explanation or citations to supporting evidence.  
6 Tr. 1450-53. Plaintiff argues the opinion is supported by the treatment notes,  
7 however the ALJ reasonably found the opinion is also not supported by the  
8 treatment records, as discussed *infra*.

9 Second, the ALJ found Ms. Hillmer's opinion was inconsistent with  
10 Plaintiff's activities of daily living. Tr. 26. Consistency with the other evidence is  
11 one of the most important factors in determining the persuasiveness of an opinion.  
12 20 C.F.R. §§ 404.1520c(b)(2), 416.920c(b)(2). As discussed *supra*, the ALJ  
13 reasonably found Plaintiff's ability to engage in multiple activities, including  
14 caring for children and taking classes through a college, is inconsistent with an  
15 opinion that Plaintiff has multiple marked limitations.

16 Third, the ALJ found Ms. Hillmer's opinion is not supported by the  
17 treatment records. Tr. 26. Supportability is one of the most important factors an  
18 ALJ must consider when determining how persuasive a medical opinion is. 20  
19 C.F.R. §§ 404.1520c(b)(2), 416.920c(b)(2). The more relevant objective evidence  
20 and supporting explanations that support a medical opinion, the more persuasive

1 the medical opinion is. 20 C.F.R. §§ 404.1520c(c)(1), 416.920c(c)(1). Plaintiff's  
2 treatment notes on the same day Ms. Hillmer rendered her opinion document  
3 normal speech, thoughts, memory, attention, language, and fund of knowledge,  
4 although Plaintiff appeared sad and depressed. Tr. 1473. At multiple  
5 appointments, Plaintiff had generally normal mental functioning despite reported  
6 symptoms. Tr. 1462, 1467-68, 1473. Plaintiff argues the medical records are  
7 consistent with Ms. Hillmer's opinion, as the records document Plaintiff's reported  
8 symptoms, including nightmares, anxiety, poor sleep, depression, and avoiding  
9 social settings, as well as noted abnormalities at some appointments, including  
10 intermittent eye contact, hesitant speech, and distractible attention/concentration.  
11 ECF No. 16 at 13 (citing Tr. 1455-57, 1460, 1471-73, 1630, 1632). However, Ms.  
12 Hillmer's records also document normal cooperation, speech, thoughts, memory,  
13 attention, language, and fund of knowledge, despite Plaintiff's reported symptoms.  
14 Tr. 1462, 1467-68, 1473. On this record, the ALJ reasonably found that Ms.  
15 Hillmer's opinion that Plaintiff had multiple marked to severe limitations was  
16 inconsistent with the objective evidence.

17 *5. Dr. Veraldi*

18 Dr. Veraldi, a reviewing psychological expert, rendered an opinion on  
19 Plaintiff's functioning at the hearing. Tr. 81-90. Dr. Veraldi stated Plaintiff has  
20 been diagnosed with depression and bipolar disorder, borderline personality

1 disorder, and PTSD. Tr. 82-83. Dr. Veraldi opined Plaintiff has a marked  
2 limitation in concentration, persisting, or maintaining pace; and moderate  
3 limitations in understanding, remembering, or applying information, adapting or  
4 managing oneself, and interacting with others. Tr. 84-85. Dr. Veraldi further  
5 opined Plaintiff could do at least simple, routine, repetitive work, she cannot work  
6 with the public but can interact in small groups as long as it is not highly  
7 cooperative, and she cannot handle fast-paced production nor having to make a lot  
8 of independent, quick decisions nor multi-tasking. Tr. 85-88. Dr. Veraldi opined  
9 Plaintiff's persistence would be impaired by stressors but her ability to sustain  
10 work without an increase in symptoms would improve if she had less stressors. Tr.  
11 87-88. She further opined Plaintiff would miss "some work" but she could not  
12 specify how many days, and said the days missed could be for  
13 psychological/medical reasons or she could just not show up for work. Tr. 89-90.  
14 The ALJ found Dr. Veraldi's opinion was generally persuasive. Tr. 25.

15 Plaintiff argues the ALJ erred in finding Dr. Veraldi's opinion was  
16 persuasive, but not fully accounting for the opinion in the RFC and at step three.  
17 ECF No. 16 at 15. Plaintiff argues the ALJ did not account for Plaintiff's marked  
18 limitation in concentration, persistence, and maintaining pace, nor the days she  
19 would miss from work. *Id.* However, Dr. Veraldi did not render an opinion on  
20 how frequently Plaintiff would miss work and stated some missed days may be due

1 to Plaintiff simply not showing up and not due to her symptoms. Tr. 89-90.

2 Although Dr. Veraldi opined Plaintiff had a marked limitation in concentration,  
3 persistence, or pace, she also opined Plaintiff was still capable of performing  
4 simple routine work with additional limitations. Tr. 85-90. The ALJ accounted for  
5 Dr. Veraldi's opinion by incorporating the opinion into the RFC. Tr. 23. Plaintiff  
6 has not demonstrated the ALJ harmfully erred by failing to incorporate a portion of  
7 Dr. Veraldi's opinion into the RFC. Plaintiff is not entitled to remand on these  
8 grounds.

### 9 C. Step Two

10 Plaintiff contends the ALJ erred at step two by failing to identify her  
11 physical conditions as severe impairments. ECF No. 16 at 15-17. At step two of  
12 the sequential process, the ALJ must determine whether claimant suffers from a  
13 "severe" impairment, i.e., one that significantly limits her physical or mental  
14 ability to do basic work activities. 20 C.F.R. §§ 404.1520(c), 416.920(c).  
15 To establish a severe impairment, the claimant must first demonstrate that the  
16 impairment results from anatomical, physiological, or psychological abnormalities  
17 that can be shown by medically acceptable clinical or laboratory diagnostic  
18 techniques. 20 C.F.R. §§ 404.1521, 416.921. In other words, the claimant must  
19 establish the existence of the physical or mental impairment through objective  
20 medical evidence (*i.e.*, signs, laboratory findings, or both) from an acceptable

1 medical source; the medical impairment cannot be established by the claimant's  
2 statement of symptoms, a diagnosis, or a medical opinion. *Id.*

3 An impairment may be found to be not severe when “medical evidence  
4 establishes only a slight abnormality or a combination of slight abnormalities  
5 which would have no more than a minimal effect on an individual’s ability to  
6 work....” Social Security Ruling (SSR) 85-28 at \*3. Similarly, an impairment is  
7 not severe if it does not significantly limit a claimant’s physical or mental ability to  
8 do basic work activities; which include walking, standing, sitting, lifting, pushing,  
9 pulling, reaching, carrying, or handling; seeing, hearing, and speaking;  
10 understanding, carrying out and remembering simple instructions; use of judgment,  
11 responding appropriately to supervision, coworkers and usual work situations; and  
12 dealing with changes in a routine work setting. 20 C.F.R. §§ 404.1522(a),  
13 416.922(a); SSR 85-28.<sup>4</sup>

14 Step two is “a de minimus screening device [used] to dispose of groundless  
15 claims.” *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996). “Thus, applying  
16 our normal standard of review to the requirements of step two, [the Court] must

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17  
18  
19 <sup>4</sup> The Supreme Court upheld the validity of the Commissioner’s severity  
20 regulation, as clarified in SSR 85-28, in *Bowen v. Yuckert*, 482 U.S. 137, 153-54  
(1987).

1 determine whether the ALJ had substantial evidence to find that the medical  
2 evidence clearly established that [Plaintiff] did not have a medically severe  
3 impairment or combination of impairments.” *Webb v. Barnhart*, 433 F.3d 683, 687  
4 (9th Cir. 2005).

5 First, the ALJ found fibromyalgia was not a medically determinable  
6 impairment. Tr. 20. Plaintiff contends the ALJ erred in failing to find  
7 fibromyalgia is a severe impairment. ECF No. 16 at 16. Plaintiff argues  
8 fibromyalgia is a severe impairment because an ARNP diagnosed fibromyalgia,  
9 and there is “no dispute” as to the presence of the signs and symptoms of  
10 fibromyalgia in the record, and the ALJ acknowledged Plaintiff was prescribed  
11 Cymbalta for fibromyalgia. *Id.* (citing Tr. 91). Plaintiff cites to the hearing when  
12 Plaintiff’s counsel stated Plaintiff had been prescribed Cymbalta, which Plaintiff  
13 reported did not help with her fibromyalgia. Tr. 91. Plaintiff does not cite to any  
14 other evidence of her fibromyalgia to support her argument that fibromyalgia is a  
15 severe medically determinable impairment. Defendant notes the Social Security  
16 Administration has set forth diagnostic criteria for fibromyalgia and Plaintiff has  
17 not argued she meets the criteria. ECF No. 17 at 2-3 (citing SSR 12-2p). The ALJ  
18 found there is no record of fibromyalgia tender point examinations in the record,  
19 nor is there documentation of repeated manifestations of typical fibromyalgia  
20 symptoms. Tr. 20. In the reply brief, Plaintiff did not respond to Defendant’s

1 argument, but only repeated the statement that there is no dispute of the symptoms  
2 of fibromyalgia in the record, without citing to any evidence of fibromyalgia in the  
3 record. ECF No. 18 at 9. Plaintiff has not met her burden in demonstrating  
4 fibromyalgia is a severe medically determinable impairment.

5 Next, Plaintiff argues the ALJ erred in failing to find her bulimia, and  
6 cervical and lumbar impairments were severe impairments. ECF No. 16 at 16-17.  
7 However, Plaintiff again does not present any arguments as to how these  
8 impairments are severe medically determinable impairments. Plaintiff has not met  
9 her burden in demonstrating the ALJ erred at step two. Plaintiff is not entitled to  
10 remand on these grounds.

#### 11 **D. Step Three**

12 Plaintiff contends that the ALJ erred by finding that Plaintiff's fibromyalgia  
13 and other impairments did not meet or equal Listings 12.04, 12.06, 12.08, 12.15,  
14 and 14.09D. ECF No. 16 at 17-18.

15 At step three, the ALJ must determine if a claimant's impairments meet or  
16 equal a listed impairment. 20 C.F.R. §§ 416.920(a)(4)(iii), 404.1520(a)(4)(iii).  
17 The Listing of Impairments "describes for each of the major body systems  
18 impairments [which are considered] severe enough to prevent an individual from  
19 doing any gainful activity, regardless of his or her age, education, or work  
20 experience." 20 C.F.R. §§ 416.925, 404.1525. "Listed impairments are

1 purposefully set at a high level of severity because ‘the listings were designed to  
2 operate as a presumption of disability that makes further inquiry unnecessary.’”  
3 *Kennedy v. Colvin*, 738 F.3d 1172, 1176 (9th Cir. 2013) (citing *Sullivan v. Zebley*,  
4 493 U.S. 521, 532 (1990)). “Listed impairments set such strict standards because  
5 they automatically end the five-step inquiry, before residual functional capacity is  
6 even considered.” *Kennedy*, 738 F.3d at 1176. If a claimant meets the listed  
7 criteria for disability, he will be found to be disabled. 20 C.F.R. §§  
8 416.920(a)(4)(iii), 404.1520(a)(4)(iii).

9 “To *meet* a listed impairment, a claimant must establish that he or she meets  
10 each characteristic of a listed impairment relevant to his or her claim.” *Tackett*,  
11 180 F.3d at 1099 (emphasis in original); 20 C.F.R. §§ 416.925(d), 404.1525(d).  
12 “To *equal* a listed impairment, a claimant must establish symptoms, signs and  
13 laboratory findings ‘at least equal in severity and duration’ to the characteristics of  
14 a relevant listed impairment . . . .” *Tackett*, 180 F.3d at 1099 (emphasis in original)  
15 (quoting 20 C.F.R. § 404.1526(a)); 20 C.F.R. § 416.926(a). “If a claimant suffers  
16 from multiple impairments and none of them individually meets or equals a listed  
17 impairment, the collective symptoms, signs and laboratory findings of all of the  
18 claimant’s impairments will be evaluated to determine whether they meet or equal  
19 the characteristics of any relevant listed impairment.” *Tackett*, 180 F.3d at 1099.  
20 However, “[m]edical equivalence must be based on medical findings,” and “[a]

1 generalized assertion of functional problems is not enough to establish disability at  
2 step three.” *Id.* at 1100 (quoting 20 C.F.R. § 404.1526(a)); 20 C.F.R. § 416.926(a).

3 The claimant bears the burden of establishing his impairment (or  
4 combination of impairments) meets or equals the criteria of a listed impairments.  
5 *Burch v. Barnhart*, 400 F.3d 676, 683 (9th Cir. 2005). “An adjudicator’s  
6 articulation of the reason(s) why the individual is or is not disabled at a later step in  
7 the sequential evaluation process will provide rationale that is sufficient for a  
8 subsequent reviewer or court to determine the basis for the finding about medical  
9 equivalence at step 3.” SSR 17-2P, 2017 WL 3928306, at \*4 (effective March 27,  
10 2017).

11 Here, the ALJ found that Plaintiff’s impairments and combinations of  
12 impairments did not meet or equal any listings, including Listing 12.04, 12.06,  
13 12.08, and 12.15. Tr. 22. The ALJ did not address whether Plaintiff’s  
14 fibromyalgia equals Listing 14.09D. However, as the ALJ did not err in finding  
15 Plaintiff’s fibromyalgia is not a severe medically determinable impairment, as  
16 discussed *supra*, the ALJ did not err in not addressing Listing 14.09D. Plaintiff’s  
17 argument regarding Listings 12.04, 12.06, and 12.08 rest on the argument that with  
18 Plaintiff’s fibromyalgia symptoms, her impairments equal the severity of one of  
19 the listings. ECF No. 16 at 18. However, Plaintiff did not meet her burden in  
20 demonstrating fibromyalgia is a severe medically determinable impairment.

1 Plaintiff also argues she has marked to extreme limitations in the paragraph B  
2 criteria but does not set forth an argument as to which B criteria she meets, nor  
3 does she set forth any argument regarding the A criteria for Listing 12.04, 12.06,  
4 12.08, nor 12.15, nor how her impairments equal any of the individual listings. *Id.*  
5 Plaintiff has not met her burden in demonstrating she meets or equals a listing.  
6 Plaintiff is not entitled to remand on these grounds.

### 7 **E. Plaintiff's Symptom Claims**

8 Plaintiff faults the ALJ for failing to rely on reasons that were clear and  
9 convincing in discrediting her symptom claims. ECF No. 16 at 19-20. An ALJ  
10 engages in a two-step analysis to determine whether to discount a claimant's  
11 testimony regarding subjective symptoms. SSR 16-3p, 2016 WL 1119029, at \*2.  
12 "First, the ALJ must determine whether there is objective medical evidence of an  
13 underlying impairment which could reasonably be expected to produce the pain or  
14 other symptoms alleged." *Molina*, 674 F.3d at 1112 (quotation marks omitted).  
15 "The claimant is not required to show that [the claimant's] impairment could  
16 reasonably be expected to cause the severity of the symptom [the claimant] has  
17 alleged; [the claimant] need only show that it could reasonably have caused some  
18 degree of the symptom." *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009).

19 Second, "[i]f the claimant meets the first test and there is no evidence of  
20 malingering, the ALJ can only reject the claimant's testimony about the severity of

1 the symptoms if [the ALJ] gives ‘specific, clear and convincing reasons’ for the  
2 rejection.” *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (citations  
3 omitted). General findings are insufficient; rather, the ALJ must identify what  
4 symptom claims are being discounted and what evidence undermines these claims.  
5 *Id.* (quoting *Lester*, 81 F.3d at 834; *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th  
6 Cir. 2002) (requiring the ALJ to sufficiently explain why it discounted claimant’s  
7 symptom claims)). “The clear and convincing [evidence] standard is the most  
8 demanding required in Social Security cases.” *Garrison v. Colvin*, 759 F.3d 995,  
9 1015 (9th Cir. 2014) (quoting *Moore v. Comm’r of Soc. Sec. Admin.*, 278 F.3d 920,  
10 924 (9th Cir. 2002)).

11 Factors to be considered in evaluating the intensity, persistence, and limiting  
12 effects of a claimant’s symptoms include: 1) daily activities; 2) the location,  
13 duration, frequency, and intensity of pain or other symptoms; 3) factors that  
14 precipitate and aggravate the symptoms; 4) the type, dosage, effectiveness, and  
15 side effects of any medication an individual takes or has taken to alleviate pain or  
16 other symptoms; 5) treatment, other than medication, an individual receives or has  
17 received for relief of pain or other symptoms; 6) any measures other than treatment  
18 an individual uses or has used to relieve pain or other symptoms; and 7) any other  
19 factors concerning an individual’s functional limitations and restrictions due to  
20 pain or other symptoms. SSR 16-3p, 2016 WL 1119029, at \*7; 20 C.F.R. §§

1 404.1529(c), 416.929(c). The ALJ is instructed to “consider all of the evidence in  
2 an individual’s record,” to “determine how symptoms limit ability to perform  
3 work-related activities.” SSR 16-3p, 2016 WL 1119029, at \*2.

4 The ALJ found that Plaintiff’s medically determinable impairments could  
5 reasonably be expected to cause some of the alleged symptoms, but that Plaintiff’s  
6 statements concerning the intensity, persistence, and limiting effects of her  
7 symptoms were not entirely consistent with the evidence. Tr. 24.

8 *1. Inconsistent Objective Medical Evidence*

9 The ALJ found Plaintiff’s symptom claims were not consistent with the  
10 objective medical evidence. Tr. 19-24. An ALJ may not discredit a claimant’s  
11 symptom testimony and deny benefits solely because the degree of the symptoms  
12 alleged is not supported by objective medical evidence. *Rollins v. Massanari*, 261  
13 F.3d 853, 857 (9th Cir. 2001); *Bunnell v. Sullivan*, 947 F.2d 341, 346-47 (9th Cir.  
14 1991); *Fair v. Bowen*, 885 F.2d 597, 601 (9th Cir. 1989); *Burch*, 400 F.3d at 680.  
15 However, the objective medical evidence is a relevant factor, along with the  
16 medical source’s information about the claimant’s pain or other symptoms, in  
17 determining the severity of a claimant’s symptoms and their disabling effects.  
18 *Rollins*, 261 F.3d at 857; 20 C.F.R. §§ 404.1529(c)(2), 416.929(c)(2).

19 The ALJ found Plaintiff’s allegations of disabling mental health symptoms  
20 were inconsistent with the generally normal mental status findings. Tr. 24.

1 Plaintiff was rarely distressed, and the examinations were generally unremarkable.  
2 *Id.* Treatment records document normal memory, mood, concentration, insight,  
3 judgment, and impulse control at multiple appointments. Tr. 22-23 (citing, e.g.,  
4 464, 469, 472, 478, 1462, 1473). Plaintiff reported symptoms, such as  
5 disorientation, depression, hearing voices that scared/distracted her, and binging  
6 and purging, Tr. 1441, 1444, but the records document no significant change in her  
7 mood, affect, thoughts, orientation, motor activity, speech, behavior, or  
8 functioning, Tr. 1437, 1440. While the records also document some abnormalities,  
9 including dysthymic and anxious mood, distractibility and poor concentration at  
10 some appointments, Tr. 22 (citing, e.g., Tr. 426, 753), the ALJ reasonably found  
11 the objective medical evidence is inconsistent with Plaintiff's allegations.

12 Plaintiff contends the ALJ made no findings regarding Plaintiff's physical  
13 impairments, and thus her physical testimony should be credited as true. ECF No.  
14 16 at 19. However, the ALJ considered Plaintiff's symptom claims related to her  
15 physical impairments at step two, as the ALJ found Plaintiff's physical  
16 impairments were not severe medically determinable impairments. Tr. 20-21. The  
17 ALJ found there are complaints of physical symptoms throughout the record, but  
18 minimal objective evidence of the impairments and any functional limitations the  
19 impairments cause. Tr. 19-21. The ALJ noted Plaintiff's physical symptom claims  
20 tend to be episodic and mild. Tr. 19-20 (citing, e.g., Tr. 644, 649, 1616). Despite

1 her symptom complaints, imaging has been normal. Tr. 20 (citing Tr. 506, 1591,  
2 1646). As discussed *supra*, there is no documentation of tender point testing nor  
3 other objective evidence to confirm a fibromyalgia diagnosis. Tr. 20. On this  
4 record, the ALJ reasonably found Plaintiff's symptom claims were inconsistent  
5 with the objective medical evidence. This was a clear and convincing reason,  
6 along with the other reasons offered, to reject Plaintiff's symptom claims.

7 *2. Activities of Daily Living*

8 The ALJ found Plaintiff's symptom allegations were inconsistent with  
9 Plaintiff's activities of daily living. Tr. 21, 24. The ALJ may consider a  
10 claimant's activities that undermine reported symptoms. *Rollins*, 261 F.3d at 857.  
11 If a claimant can spend a substantial part of the day engaged in pursuits involving  
12 the performance of exertional or non-exertional functions, the ALJ may find these  
13 activities inconsistent with the reported disabling symptoms. *Fair*, 885 F.2d at  
14 603; *Molina*, 674 F.3d at 1113. "While a claimant need not vegetate in a dark  
15 room in order to be eligible for benefits, the ALJ may discount a claimant's  
16 symptom claims when the claimant reports participation in everyday activities  
17 indicating capacities that are transferable to a work setting" or when activities  
18 "contradict claims of a totally debilitating impairment." *Molina*, 674 F.3d at 1112-  
19 13. The ability to care for others without help has been considered an activity that  
20 may undermine claims of totally disabling pain. *Rollins*, 261 F.3d at 857.

1 However, if the care activities are to serve as a basis for the ALJ to discredit the  
2 Plaintiff's symptom claims, the record must identify the nature, scope, and  
3 duration of the care involved and this care must be "hands on" rather than a "one-  
4 off" care activity. *Trevizo v. Berryhill*, 871 F.3d 664, 675-76 (9th Cir. 2017).

5 The ALJ found Plaintiff's allegations of disabling mental health symptoms,  
6 and her reports of engaging in minimal activities, are inconsistent with her reports  
7 to medical providers. Tr. 24. While Plaintiff testified that she receives significant  
8 help from her parents, she reported to medical providers that she provides care to  
9 multiple children with no support. *Id.* (citing Tr. 583, 1528, 1537). Plaintiff has  
10 reported preparing meals, completing chores, driving, shopping, and handling her  
11 own finances. Tr. 24 (citing Tr. 356-57). Plaintiff testified that she was enrolled in  
12 GED preparation classes, but she told a provider she was attending community  
13 college for business management. Tr. 24 (citing Tr. 1576). Plaintiff argues her  
14 activities are consistent with her allegations, as she needs assistance with her  
15 daughter's activities, and she had difficulties with her GED classes and was unable  
16 to complete them. ECF No. 16 at 20. However, there are multiple records that  
17 reference Plaintiff "doing everything by herself," and providing the care for her  
18 children alone. Tr. 583, 1434, 1455, 1528, 1576. There are also records that note  
19 Plaintiff reported her mother was coming into town, and her mother only coming  
20 to assist for a few months at the end of 2019, which indicates her mother

1 previously was not around to assist. Tr. 1460, 1466. It is unclear from the record  
2 what classes Plaintiff took through a college, but Plaintiff concedes she was taking  
3 classes. While Plaintiff argues she had difficulty with the classes, and she testified  
4 at her April 2020 hearing that she was unable to complete the GED classes, Tr. 97,  
5 Plaintiff reported to a provider that she successfully completed the classes by  
6 January 2020, Tr. 1466.

7 The ALJ also found Plaintiff's physical symptom complaints were  
8 inconsistent with Plaintiff's activities of daily living. Tr. 21. Plaintiff reported  
9 being able to handle her self-care, chores, and meal preparation, and she can shop,  
10 drive, care for her children, and attend school, although she reported receiving  
11 some assistance with tasks from her parents. *Id.* (citing Tr. 356-57). On this  
12 record, the ALJ reasonably found the Plaintiff's activities of daily living were  
13 inconsistent with her symptom claims. This was a clear and convincing reason,  
14 supported by substantial evidence, to reject Plaintiff's symptom claims.

### 15 3. *Lack of Treatment*

16 The ALJ found Plaintiff's lack of treatment was inconsistent with her  
17 allegations. Tr. 21. An unexplained, or inadequately explained, failure to seek  
18 treatment or follow a prescribed course of treatment may be considered when  
19 evaluating the claimant's subjective symptoms. *Orn v. Astrue*, 495 F.3d 625, 638  
20 (9th Cir. 2007). And evidence of a claimant's self-limitation and lack of

1 motivation to seek treatment are appropriate considerations in determining the  
2 credibility of a claimant's subjective symptom reports. *Osenbrock v. Apfel*, 240  
3 F.3d 1157, 1165-66 (9th Cir. 2001). When there is no evidence suggesting that the  
4 failure to seek or participate in treatment is attributable to a mental impairment  
5 rather than a personal preference, it is reasonable for the ALJ to conclude that the  
6 level or frequency of treatment is inconsistent with the alleged severity of  
7 complaints. *Molina*, 674 F.3d at 1113-14. But when the evidence suggests lack of  
8 mental health treatment is partly due to a claimant's mental health condition, it  
9 may be inappropriate to consider a claimant's lack of mental health treatment when  
10 evaluating the claimant's failure to participate in treatment. *Nguyen v. Chater*, 100  
11 F.3d 1462, 1465 (9th Cir. 1996).

12 While Plaintiff alleges disabling mental health symptoms, the ALJ found  
13 such allegations were inconsistent with Plaintiff's routine, infrequent mental health  
14 treatment. Tr. 24 (citing Tr. 1429-49, 1454-75). Plaintiff argues the ALJ's finding  
15 is not supported by substantial evidence, as she was seen by multiple providers for  
16 mental health treatment. ECF No. 16 at 20. As Defendant notes, Plaintiff had  
17 periods where she went up to two to three months without counseling. ECF No. 17  
18 at 8-9, Tr. 1436, 1444. Plaintiff was seen for counseling and medication  
19 management but needed minimal medication adjustments and she did not  
20 demonstrate a need for more frequent counseling. Tr. 1436, 1457, 1462-63, 1467-

68. Plaintiff does not offer any explanation for her two-to-three-month gaps in treatment.

The ALJ also found Plaintiff's lack of ongoing treatment was inconsistent with Plaintiff's allegations of chronic, disabling physical impairments. Tr. 21. Plaintiff has generally received intermittent treatment for various acute and transient symptoms. *Id.* For example, while Plaintiff complains of chronic and significant headaches, there is minimal evidence of treatment for headaches in the record and she often denied having a headache. Tr. 19, 772, 1394, 1398, 1493, 1520. On this record, the ALJ reasonably concluded that Plaintiff's symptom claims were inconsistent with her lack of treatment. This finding is supported by substantial evidence and was a clear and convincing reason to discount Plaintiff's symptom complaints. Plaintiff is not entitled to remand on these grounds.

#### **F. Step Five**

Plaintiff contends the ALJ erred at step five by relying on the vocational expert's response to an incomplete hypothetical. ECF No. 16 at 21. However, Plaintiff's argument is based entirely on the assumption that the ALJ erred in considering the medical opinion evidence and Plaintiff's symptom claims. *Id.* For reasons discussed throughout this decision, the ALJ's rejection of Plaintiff's symptom claims, and consideration of the medical opinion evidence are legally sufficient and supported by substantial evidence. Thus, the ALJ did not err in

1 finding Plaintiff capable of performing other work in the national economy based  
2 on the hypothetical containing Plaintiff's RFC. Plaintiff is not entitled to remand  
3 on these grounds.

4 **CONCLUSION**

5 Having reviewed the record and the ALJ's findings, the Court concludes the  
6 ALJ's decision is supported by substantial evidence and free of harmful legal error.  
7 Accordingly, **IT IS HEREBY ORDERED:**

8 1. Plaintiff's Motion for Summary Judgment, **ECF No. 16**, is **DENIED**.

9 2. Defendant's Motion for Summary Judgment, **ECF No. 17**, is  
10 **GRANTED**.

11 3. The Clerk's Office shall enter **JUDGMENT** in favor of Defendant.

12 The District Court Executive is directed to file this Order, provide copies to  
13 counsel, and **CLOSE THE FILE**.

14 DATED May 19, 2022.

15 s/Mary K. Dimke  
16 MARY K. DIMKE  
17 UNITED STATES DISTRICT JUDGE  
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